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IN THE

Supreme Court of the United States

October Term, 1963

No. 557

JOHN BERKERY, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered on July 19, 1963, refusing to accept an appeal from the Superior Court of Pennsylvania affirming the judgment of the Court of Quarter Sessions of Philadelphia County sentencing petitioner to imprisonment, pursuant to the verdict of the Court, sitting without a jury, finding petitioner guilty of attempted burglary, conspiracy and possession of burglary tools.

OPINIONS BELOW

The opinion of the Court of Quarter Sessions of Philadelphia County, denying petitioner's post-trial motions, commences at page 284a of the record. The opinion of the Superior Court of Pennsylvania denying petitioner's motions in arrest of judgment, and for a new trial is reported at 200 Pa. Superior Court 626 (1963), and appears in the certified copy of the record from said court. The order of the Pennsylvania Supreme Court denying an appeal from the Pennsylvania Superior Court is not reported, but appears in the certified record from that court.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on July 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3) and Rule 22 (1).

QUESTION PRESENTED

Was it a violation of the Due Process Clause of the Fourteenth Amendment for the Trial Court, a judge sitting without a jury, to make an adjudication in this case when during the course of the trial, the Court learned, from information supplied by the Commonwealth, that the defendant was charged with other serious crimes which were receiving the widest of publicity and notoriety?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES INVOLVED

1. United States Constitution, Amendment XIV, Section 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

2. Act of June 11, 1935, P.L. 319, No. 141, Sec. 2, 19 Purdon's Statutes Sec. 787.

> "When a defendant has waived trial by jury, and elected to be tried by a judge without a jury, in accordance with the provisions of the proceeding section, any judge of the court, in which the cause is pending wherein a waiver of trial by jury and election to be tried by a judge without a jury is filed, shall have jurisdiction to hold the trial, and shall proceed to hear, try, and determine all issues of law and fact, and to render a general verdict in like manner as if the defendant had put himself upon the inquest or country for trial, and his cause were being tried before a jury, and the said trial judge may, after hearing the case, order the withdrawal or waiver of trial by jury withdrawn, and order and direct that the case be tried before a jury."

STATEMENT OF THE CASE

Petitioner was tried before a judge sitting without a jury under dates of September 25, September 26, 1961, and October 9, 1961, under bills of indictment charging him with burglary, conspiracy and possession of burglary tools.

The charges stemmed from an incident on June 12, 1959. The Commonwealth presented evidence that at approximately 3:30 A.M. on the date mentioned, the petitioner and one Vincent Blaney had burglarized the plant of the American Business Systems Company in Philadelphia, Pennsylvania. When arrested, both defendants were found lying on the ground against a cyclone fence which enclosed the plant. Entrance into the yard had been made by the cyclone fence gate. A chain securing the gate was found to have been broken and certain tools, which the Commonwealth contended were burglary tools, were found in the rear yard and a chisel was removed from a raincoat worn by the defendant. Actual entry into the plant had not been made, and no loss had been sustained by the American Business Systems Company.

On October 9, 1961, petitioner was found guilty on all bills as charged except that on the burglary bill a finding of attempted burglary was made. The factual circumstances giving rise to the instant issue was as follows: During the examination of a Commonwealth witness, one Catherine Hogan, the District Attorney pleaded surprise and sought to cross-examine the witness on a question pertaining to the ownership of an automobile used on the night the petitioner was arrested. For this purpose the District Attorney sought to use a written statement given by the witness to police authorities, which contained information at variance with the witness's testimony. The District Attorney desired to use only that portion of the written statement which related to the ownership of the automobile. Objection was made to the use of the statement by defense counsel and it was subsequently handed to the trial judge, and read by him.

The statement, which had been given by the witness about a year following the incident on which the petitioner was being tried, had been procured by the police during their investigation into the death of one Vincent Blaney. The latter had been indicted with the petitioner in the instant case. The statement, as noted by the Superior Court of Pennsylvania in its opinion (200 Pa. Superior Court 626), "contained some matters not relevant to this case—particularly about the co-defendant who was then deceased. The court, thereafter, indicated that he recognized the defendant as the person whose name had been linked with another pending criminal case receiving wide publicity."

Upon examining the statement the trial judge stated:

> "Perhaps I shouldn't read this because I am the jury, particularly the conversation of the co-defendant who is now deceased." (R. 123a-124a.)

Thereafter the identity of the defendant as being charged with the other serious offenses registered with the trial judge:

> "The Court: Well, of course, you have worked with it. But I came in here Monday morning, and saw the name and it didn't register with me until after the case was developing." (R. 239a.)

REASON FOR GRANTING THE WRIT

A defendant who is tried without a jury surrenders none of his substantive rights. A trial judge is bound by the same legal principles as the jury.

Commonwealth v. Richmond, 132 Pa. Superior Ct. 529, 531.

The Pennsylvania statute authorizing a waiver of jury trial in a criminal case recognizes this fact: The trial shall be "as if the defendant had put himself upon the inquest or country for trial, and his case were being tried before a jury . . ." Act of June 11, 1935, P.L. 319, No. 141, Sec. 2, 19 Purdon's Statutes Sec. 787.

If it was revealed to a jury that the defendant on trial had been indicted for other crimes, such knowledge on the part of the jury would be grounds for the withdrawal of a juror.

See *Commonwealth v. Petrillo*, 338 Pa. 65, 91.

In *Michelson v. United States*, 335 U.S. 469, this Court stated at 475-476:

> ". . . The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge . . ."

The information obtained by the trial judge from the statement was not only irrelevant (in fact, the cross-examination on the plea of surprise was limited to a collateral matter), but contained the highest degree of prejudicial

content. As a result, the trial judge, no matter how fair or impartial he may have consciously sought to be could not help but be influenced by this information. This is particularly true in this case. Here the Commonwealth's case was in the main predicated on circumstantial evidence. The defense, on the other hand, rested in large measure on the testimony of the petitioner who testified in his own behalf and attempted to explain his presence in the yard at the time of his arrest. The decision of the court rested upon the credibility of the petitioner. The additional irrelevant prejudicial information obtained may well have tipped the scales against petitioner.

The effect of this acquisition of highly prejudicial information concerning the criminal activities of the defendant by the fact finding authority before an adjudication is made has received recent judicial and legislative attention in Pennsylvania Criminal procedure.

In *United States ex rel. Scoleri v. Banmiller*, 310 F. 2d 720 (3rd Cir. 1962), the Court of Appeals for the Third Circuit held that a Pennsylvania practice of long standing (since 1925) of introducing the prior criminal record of a defendant in a murder case before an adjudication of guilt for purposes of punishment only, constituted a denial of due process. The legislature of Pennsylvania likewise recognized the basic unfairness of the procedure and adopted a "split-verdict" statute to erase the evil. (Act of December 1, 1959, P.L. 1621 Sec. 1, 18 Purdon's Statutes 4701.)

The evil inherent in the instant case is that knowledge obtained by the trial judge of defendant's background creates an uncertainty as to whether the judge made his finding of guilt from the competent evidence presented by the Commonwealth or partly from the knowledge of defendant's background and record. It is not intimated that the trial judge consciously applied this information in making his adjudication. Rather, he, like any juror or other human being is affected by prejudicial information, and one can never say with certainty that the information so obtained played no role in the final determination of the court.

CONCLUSION

For the foregoing reasons, it is submitted that a writ of certiorari should be issued to review the judgment of the Supreme Court of Pennsylvania in the instant case.

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BRIEF IN OPPOSITION

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JURISDICTION

Jurisdiction under 28 U. S. C. Sec. 1257, and Rule 22 (1) is denied. No federal question was raised by petitioner nor decided by any Court below. Petitioner did not, because unable to, comply with Rule 23 (1) (f).

ARGUMENT

In addition to the failure to preserve a federal question, the petition should be denied for the following reasons:

1. No conflict of decisions is alleged which might prompt this Court to accept jurisdiction;

2. The case involves no legal principles affecting any broad field of law or litigants wherein a needed definitive judgment may result from granting certiorari. It involves only the weighing of a precise revelation to the trier of fact [here an experienced Judge acting on waiver of jury trial] of an undisclosed piece of information concerning petitioner, presumably of a derogatory nature, but not connected with the case here;

3. No objection was made by petitioner to the Court's reading the document; no motion for a mistrial was made by petitioner at any time;

4. The confidence demonstrated by the experienced trial judge [200 Pa. Superior Ct. 626, 628-9] that the improper matter would have no effect upon his judgment, is upheld by the Superior and Supreme Courts of Pennsylvania [the latter through refusal of appeal] and is further corroborated through the facts of the case, with the testimony clearly supporting the verdict, and the mild sentence negating any claim of prejudice;

5. The possibilities and probabilities of the effect of foreign influences which have improperly been permitted to reach the minds of the triers of facts are well considered in the important case of *Commonwealth v. Evans*, Appellant, 399 Pa. 387 (1960) at page 397.

After mentioning the virtual impossibility of an immaculate trial of any magnitude, the opinion says of directions to disregard the objectionable material: (398)

"There is no standard by which the effect of such formally 'sterilized' testimony on the minds of the jury can be gauged. . . ."

"It is, I believe, humanly impossible to set up a test or standard which can demonstrate definitely or with mathematical certainty whether a jury was able to eliminate from its mind and decision, certain incompetent evidence or whether that evidence was of such a nature and character that notwithstanding the instructions or admonitions of the trial judge, it remained in and influenced and prejudiced their minds.

The opinion at this point considers some situations in which the question needed to be resolved, and the Court's careful consideration is obvious.

The cases cited by petitioner are not helpful to him. In *Commonwealth v. Petrillo*, 338 Pa. 65, 91, the offensive revelations were made by the prosecutor through violent promises to expose "other killings" of the same nature. The actions were deliberate, not fortuitous, as here.

Commonwealth v. Richman [cited inadvertently as *Richmond*] 132 Pa. Superior Ct. 529, is not pertinent. The miscarriage of justice was clear from the record which showed unmistakably that the judge, trying without a jury, had made up his mind as to the defendant's guilt before completion of the testimony.

In *United States ex rel. Scoleri v. Banmiller*, 310 F. 2d 720 (3 Cir. 1962) the Court of Appeals declared prejudicial a long-established rule of evidence in Pennsylvania. Under the rule, the Commonwealth was permitted to show in its case in chief prior convictions of a defendant charged with murder. The jury was instructed to consider first the guilt or innocence of the defendant, and, if he was found guilty, the degree of guilt; this was to be done without considering the record of defendant. It was only after arriving at a verdict of guilty of murder of the first degree that the jury might consider the defendant's previous record. The case here is of a different nature.

Michelson v. United States, 335 U. S. 469, is quoted by petitioner for its frequently used passage on the possible damaging effect upon a jury of the revelation to them of defendant's past brushes with the law. Mr. Justice Jackson surely never expected that these words, plucked from a longer dissertation, should cover every situation in which it might be used. Indeed, footnotes 8 and 9 to the quoted paragraph, qualify the very matter quoted. The bulk of the opinion is devoted to an examination of the dangers inherent in rules of this sort, whether they are primarily restrictive or whether they tend to lower all barriers.

Pennsylvania has been careful in these matters. In *Commonwealth v. Wilson, Appellant*, 316 Pa. 129 (134), the Supreme Court of Pennsylvania, on appeal from the Superior Court, sustaining a conviction of conversion by a bank officer, upheld the Superior Court upon the opinion of Judge Keller, 112 Pa. Superior Ct. 240. Judge Keller said: [quoted in 316 Pa. at 138]

> "If the remark is of such a character as to violate the accused's constitutional rights, such as a reference to his failure to take the witness stand it cannot be cured by the trial judge and a new trial must be ordered; but in other cases unless the remarks are too flagrant they can generally be cured by the instructions of the court [citing cases].

The great majority of these cases arise from prejudicial remarks made by an overzealous prosecutor. *Wilson* reviews a list of cases in which such remarks were not considered sufficiently injurious to require a new trial. This treatment begins at 316 Pa. 143, and concludes with the passage quoted above.

It may be pointed out that when an elected officer of the Court, a District Attorney, makes such remarks, they are more liable to have a lasting effect than the statement here, which obviously involves hearsay as far it relates to petitioner.

CONCLUSION

Petitioner has not presented a matter calling for consideration by this Court.

Respectfully submitted,

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